UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

SECURITY WALLS, LLC

and **CASE 28–CA–22483**

ORLANDO FRANCO, an Individual

Liza Walker-McBride, Esq., for the General Counsel.
George Cherpelis, Esq., for the Respondent.

DECISION

Statement of the Case

MARGARET G. BRAKEBUSCH, Administrative Law Judge. This case was tried in Carlsbad, New Mexico on July 28 and 29, 2009. The charge was filed by Orlando Franco (Franco) on April 24, 2009,[1] and an amended complaint issued on July 10, 2009.

The amended complaint alleges that during a period from on or about April 2008 through or about February 2009, certain employees of Security Walls, LLC (Respondent) concertedly complained to the Respondent and engaged in protected concerted activity. The amended complaint further alleges that Respondent violated Section 8(a)(1) of the Act by issuing written reprimands to employees Jeff Ortega (Ortega) and Royal Jacobs (Jacobs) and by discharging Franco because its employees engaged in protected concerted activities. At the onset of the hearing, Counsel for the General Counsel filed a Motion to Amend the Amended Complaint. General Counsel's motion alleges that since October 24, 2008, Respondent has maintained an overly-broad confidentiality rule in its Employee Handbook. Pursuant to Section 102.17 of the Board's Rules and Regulations, the Motion was granted[2].

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1 All dates are in 2009 unless otherwise indicated.

2 Counsel for the General Counsel submitted that the allegedly unlawful language was not known to General Counsel until Respondent produced documentation in response to the General Counsel's subpoena. There is no factual dispute that the allegedly unlawful language is contained in Respondent's Employee Handbook and its Restrictive Covenants Policy. The only issue is whether the language constitutes an overly-broad confidentiality rule in violation of the Act. Inasmuch as Respondent was given the opportunity to not only present testimonial evidence, but to also submit argument in a post hearing brief, the motion was granted over the

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Respondent amended its answer to deny the additional allegation.

On the entire record,[3] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following:

I. Findings of Fact

I. Jurisdiction

Respondent, a limited liability company, with principal offices in Knoxville, Tennessee, and an office and place of business in Carlsbad, New Mexico, has been engaged in the business of providing contract security at the Waste Isolation Pilot Program in Carlsbad, New Mexico. During the 12-month period ending April 24, 2009, Respondent performed services valued in excess of $50,000 in states other than the State of New Mexico. Respondent admits, and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7).

II. Alleged Unfair Labor Practices

A. Background

Approximately 32 to 34 miles southeast of Carlsbad, New Mexico, the U.S. Department of Energy (DOE) operates the Waste Isolation Pilot Plant (WIPP); a facility that is responsible for the safe disposal of nuclear waste. The site is located in the Chihuahuan Desert and is unique because it is the depository of all of the nuclear industry waste in the United States. The DOE contracts with Washington Tru Solutions LLC (WTS) to manage the WIPP facility. The 30 acre facility covers approximately 16 square miles. The facility is surrounded by an 8 to 10 foot high fence; topped with strands of barbed wire.

1. Respondent's responsibilities at the WIPP site

Respondent is a Tennessee limited liability company with an office and place of business in Carlsbad, New Mexico, where it has contracted with WTS to provide security at the WIPP site since April 1, 2008. In providing security for the entire 30 acres of the facility, Respondent's Security Police Officers (SPOs) focus primarily on access control for the facility and protection of the facility and its occupants at all times. As a part of this contractual obligation, Respondent is responsible for vehicle controls similar to law enforcement in any small city. Respondent is additionally responsible for pedestrian patrols, access control, and the monitoring of badges for employees. Because the facility is in an isolated area, the facility must be self-sufficient in maintaining its own fire department, ambulance service, and medical staff. Respondent's contract mandates that its employees

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objection of Respondent.

[3] In conjunction with her post-hearing brief, Counsel for the General Counsel filed a motion to correct the record; citing five instances in which the transcript contained errors. Respondent filed no opposition to General Counsel's motion. I have reviewed the record and find merit to General Counsel's motion. Accordingly, the motion is granted and the record is corrected consistent with General Counsel's motion of September 16, 2009.

provide fire brigade support for the respective emergency response teams in the facility.

2. The duties and responsibilities of the SPOs

Respondent's protective force is composed of five crews; four of which are rotating crews. The fifth crew functions as a relief crew and only works day shift hours. During the time period in issue, Respondent employed five captains who were salaried and who supervised the respective crews. There were also four sergeants who were paid hourly and who could fill in for a captain in the captain's absence. Under the terms of the security contract, a minimum of three SPOs were required to be on duty at all times on each shift. Each shift is usually 12 hours in length and no employee is allowed to work more than 16 hours in any shift.

Respondent employs approximately 20 SPOs at the site. Their uniforms are similar to those of military officers. While on duty, the SPOs wear tri-color desert camouflage uniforms and armored vests. In addition to carrying radios, handcuffs, and flashlights, the officers also carry a respirators and gas masks in the event of an attack or accidental release of the nuclear waste. Those SPOs who have qualified for a Q-clearance also carry a sidearm. Under the provisions of the Atomic Energy Act, the SPOs have the authority to arrest violators for committing felonies on the site and for misdemeanors that are witnessed by the officer. Visitors to the facility are under escort at all times and are required to view a safety video before they are given authorization to enter the facility. Visitors are not allowed to tour the facility unless the visit has been pre-arranged through the Department of State or the Department of Energy.

Richard De Los Santos (De Los Santos) has been Respondent's Project Manager at the WIPP facility since March 20, 2008. As Project Manager, De Los Santos is held accountable for managing the activities and duties of the Protective Force for the WIPP site. Under the terms of WTS's contract with Respondent, WTS has an over-site supervisor who supervises De Los Santos' actions and recommendations. WTS's representative, in turn, reports to the DOE's local field office security specialist who oversees the security activities for the site. Prior to April 2008, the security services for WIPP were contractually provided by Santa Fe Protective Services (Santa Fe).

Mark Friend is a staff procurement specialist and contract administrator for the contract between WTS and Respondent. Friend testified that under the terms of WTS's contract with the DOE, the government can penalize WTS if the Respondent fails to meet any portion of their contract requirements. Friend explained that such penalty could be triggered by Respondent's failing to provide the adequate number of SPOs or by failing to meet the fire brigade requirements. Friend went on to explain that under the terms of the contract, Respondent is responsible for providing the site with a protective force 24 hours a day for 365 days of the year.

3. Respondent's obligations to provide fire brigade coverage

Under Respondent's contract with WTS, Respondent is required to have fire brigade-qualified employees available to cover each shift and to provide coverage 24/7. Specifically, Respondent must provide two SPOs per shift that are fire qualified. In order for an officer to qualify for fire brigade coverage, the officer must have annual fire school training. As of February 2009, only 50% of Respondent's SPOs were fire brigade certified. If Respondent is

unable to provide trained SPOs for fire brigade and emergency services, Respondent's ability to protect the facility is compromised and Respondent is required to inform WTS that Respondent is unable to meet the contractual requirements. If Respondent is unable to provide the coverage, WTS must contact the Eddy County Fire Department and the Lee County Fire Department to request assistance in coverage. The Eddy County Fire Department is located 32 miles from the WIPP site and the Lee County Fire Department is located approximately 40 miles from the facility. If WTS cannot arrange for alternate coverage, the facility is closed down for waste handling operations.

4. SPO pay rates

During the time that Santa Fe maintained the contract for security services, the (SPOs) were given a $2.00 per hour increase in pay when they received a Q-clearance. A Q-clearance allows the SPO to handle classified information belonging to the DOE, as well as to carry a sidearm. The length of time required for an officer to satisfy the requirements for a Q-clearance can take as much as six months to a year depending upon the level of investigation required. When Respondent assumed the contract for the security services at the WIPP, Respondent discontinued the policy of paying the additional $2 an hour for the Q-clearance. Respondent did, however, give all of its hourly employees a $2 an hour raise when Respondent assumed the contract in 2008.

B. Respondent's Alleged Violations Involving Franco, Ortega, and Jacobs

The complaint specifically alleges that during the period from in or about April 2008 through in or about February 2009, Franco, Ortega, and Jacobs, and other employees concertedly complained to the Respondent and engaged in protected concerted activity by complaining about, and discussing among themselves, the rate of pay received by SPOs and other matters relating to wages, hours, and working conditions. The complaint further alleges that on or about February 24, Franco, Ortega, and Jacobs engaged in a protected, concerted protest regarding the Respondent's distribution of overtime hours among full-time and part-time employees of Respondent.

1. Discussions and meetings about equal pay

Franco was employed by Respondent as a SPO from April 2008 until February 24, 2009. At the time of his discharge in February 2009, Franco reported to Captain Robert Ybarra (Ybarra). Prior to working for Respondent, Franco had also worked at the WIPP facility for Santa Fe. When Respondent took over the security contract at the WIPP facility, Franco had not as yet received his Q-clearance. Without the Q-clearance, Franco did not carry a sidearm and his pay was $2 an hour less than armed officers. Franco would have received a $2 an hour raise upon his receipt of the Q-clearance under the prior pay rate schedule utilized by Santa Fe. In June 2008, Franco received his Q-clearance. Although Respondent gave all of its hourly employees a $2 an hour raise when Respondent assumed the contract, Respondent did not adopt Santa Fe's practice of increasing the officers' pay upon receipt of the Q-clearance. SPOs Jeff Ortega and Naaman Martinez also received their Q-clearances on or about the same time that Franco received his Q-clearance. Under Respondent's policy, none of these three officers received a pay increase for their receipt of the Q-clearance. Franco, Ortega, and Martinez discussed meeting with Respondent's owner; Juanita Walls (Walls), to request equal pay for all of the armed officers. After requesting their meeting through the chain of command, a meeting was held on September 25, 2008. Walls

and De Los Santos attended the meeting with Franco and Martinez. Franco testified that during the meeting, he asked Walls to "bump up" the pay for the officers who had obtained their Q-clearance since Respondent had assumed the contract in order that all armed officers would receive the same pay. Walls explained that while the $2 an hour raise for obtaining the Q-clearance had been Santa Fe's policy, it was not hers. She declined to do so.

Franco testified that in January 2009, Captain Robert Ybarra (Ybarra) mentioned a new law involving equal pay for equal work. Franco and Jeff Ortega researched the law online and concluded that Respondent must pay all of the armed officers the same pay rate. Ortega and Franco requested a meeting with De Los Santos to discuss their conclusion. When De Los Santos met with Franco and Ortega in January, he explained that he had already discussed the matter with Walls. De Los Santos relayed Walls explanation that because Respondent utilized a merit determination system for compensation, Respondent was exempt from the "Equal Work for Equal Pay Act." Franco testified that even though the meeting ended on good terms, he continued to believe that the Equal Pay for Equal Work Act applied to him. Although he independently contacted the Department of Labor, he found nothing more to support his theory. Franco also testified that while he mentioned unionization to some other officers, no action was ever taken in this regard.

Jeff Ortega did not attend the September 25, 2008 meeting. He did, however, recall meeting with Franco and De Los Santos in January 2009 to discuss the issue of additional pay for receiving the Q-clearance. In contrast to Franco's testimony, Ortega recalled that De Los Santos told them that he would discuss the matter with Walls and get back with them. Ortega did not remember if De Los Santos ever got back to them with a response. Ortega had no independent recollection of Franco's specifically talking with the other employees about getting the $2 raise. Ortega recalled that everyone was "pretty upset" about the change in pay policy and that everyone discussed the issue.

2. Respondent's procedure for awarding overtime

When Respondent took over the security contract in April 2008, Respondent continued the same practice that had been used by Santa Fe in soliciting employees to work overtime. Respondent continued to utilize a record identified as an augmentation list. Under the procedure, the employee who has the least amount of accumulated overtime hours on the augmentation list is the first employee to be contacted and offered available overtime. The augmentation list documents the times and dates when employees are offered overtime. If an employee is contacted and declines the available overtime, the employee then moves to the bottom of the list to be called for overtime. In other words, if an employee declines the opportunity to work the overtime, the result is the same as if the employee had actually accepted and worked the overtime. If Respondent cannot reach an employee and there is no rejection of the offered overtime, the employee is not charged with the overtime hours and remains at the same place on the overtime list. If there are not sufficient hourly employees available to work overtime and to provide the necessary coverage, captains can cover the shifts if needed. Captain Ybarra testified, however, that captains are not qualified for fire brigade and cannot fill in for SPOs if fire brigade coverage is needed.

3. Respondent's offer of overtime in February 2009

On February 16, 2009, Sergeant William Smith sent an e-mail to Captain Ybarra and Captain Ray Lopez notifying them that an officer was needed for fire brigade coverage for the night shift for February 24, 25, and 26, 2009. De Los Santos received a copy of the e-mail and testified that Captain Ybarra would have notified his crew that officers were required for this period of time. The notification of overtime availability was confirmed by Ortega's testimony. He testified that approximately a week before February 24, he learned that overtime was going to be available for this time period. Ortega told Captain Sammy Mendez that he would work the overtime. Mendez came back to him, however, and told him that he would not be needed because part-time employee Julie Ruiz had first choice and she would work the overtime.

4. Julie Ruiz's work with Respondent

Julie Ruiz (Ruiz) was employed full-time by Respondent as an SPO from April 2008 until September 2008; when she became a full-time firefighter and emergency services technician with WTS. After September 2008, Ruiz continued to work part-time for Respondent as an SPO if she were needed. Ruiz estimated, however, that for the period of time from September 2008 until the date of her testimony of July 28, 2009, she only worked four 12-hour shifts for Respondent. Because she was only a part-time employee for Respondent, Ruiz received regular pay rather than overtime pay. Had Respondent's full-time employees worked those four shifts, they would have received overtime pay. Ruiz recalled that after leaving full time employment with Respondent, several SPOs made comments about the hours that she was working and the pay that she was receiving. She testified that such comments included "You must be making a lot of money, now you are working with WTS, plus you are working part-time over here with Security Walls." Ruiz was only receiving "training wages" with WTS and she tried to explain to the officers that she was not receiving a lot of money. Ruiz testified that almost every day she heard similar comments from the SPOs as she cleared security to report to work at the facility.

5. Franco's contact with Ruiz

On February 23, 2009, Ruiz received a telephone call as she was driving home after completing her shift with WTS. When she answered her cell phone, she was unfamiliar with the telephone number. Seeing that the area code for the caller was "234," she thought that it was someone calling her from work and she assumed that she might have forgotten something from work. When she answered, the caller stated: "You know what? I am just calling you to let you know that you need to lay off the overtime." She asked the caller to identify himself. When Franco[4] identified himself, Ruiz asked what he meant by his comment about overtime. Franco repeated "lay off the overtime." She testified that he told her that he was not mad at her, however, she needed to layoff the overtime. Ruiz recalled that she responded:

> Franco, you shouldn't be calling me. I don't make up the hours or whatever. You need to talk to De Los Santos or whoever, but don't call me and tell me

[4] Although Ruiz referred to Franco in her testimony as "Lando," there is no dispute that Ruiz was referring to Orlando Franco.

> not to work or to work. Franco, if you are wanting overtime hours, there is overtime tomorrow night, because I can't work it. I am already working on my full-time job, and if you want to work that overtime, go ahead and work that one because I can't work it.

Ruiz recalled that Franco again responded that he was just letting her know to layoff off the overtime. Ruiz told him that she did not want to hear anymore and she hung up. She testified that Franco's call had been upsetting.[5] After hanging up, she initially thought about returning to the facility to confront Franco about his call. She decided, however, to try to calm down and to talk with him when she got to work the next day. She anticipated that she would see him the next morning as she began her shift and he ended his shift. She did not, however, see Franco during shift turnover the next day.

Franco does not deny that he made the telephone call to Ruiz on February 23, 2009. He asserts that his purpose in telephoning her was to ask her "not" to take "as much overtime" in order that he and other officers could get the overtime. There is no dispute that Franco made the call while he was at work and he did so using a speakerphone. There is also no dispute that Jeff Ortega was present in the room when he made the call. Franco contends that he told Ruiz: "Well, hey, you know, I was just calling to ask you if you know you think you could kind of lay off the overtime so we could get some?" Franco recalled that Ruiz replied: "Well it is not my problem that you guys don't want to take it. " Franco asserted that Ruiz sounded "kind of angry" and he had assured her: "We are not mad at you." Franco asserts that he told Ruiz that he was asking her as a "favor" not to take the overtime. He does not dispute that she told him that she was not working the overtime on February 24, 2009 and he could have it.

Although Ortega was present during Franco's telephone call to Ruiz, he did not participate in the conversation. Ortega's recollection of the conversation was that Franco asked Ruiz if she would "ease up" on the overtime because some of the other officers wanted overtime as well. He also recalled that Ruiz told Franco that it was not her fault that Respondent called her first all the time and they didn't want to work.

During her lunch hour on February 24, Ruiz contacted De Los Santos in his office. She told De Los Santos that she was there to complain about the telephone call that she had received. She described her telephone conversation with Franco in detail with De Los Santos and asked De Los Santos to speak with Franco. Ruiz told De Los Santos that it should be his call or the Captain's call as to whether she was going to work the overtime and not Franco's. Ruiz recalled that after listening to her, De Los Santos responded that he had had enough of Franco. Ruiz did not respond and left to go to lunch. A day or two after their conversation, De Los Santos asked Ruiz to put her complaint about Franco in writing.

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[5] In an affidavit given to Respondent's earlier counsel (as distinguished from Respondent's counsel at hearing) and dated May 18, 2009, Ruiz stated that she could tell that Franco was very upset and she felt threatened. She added that the telephone call scared and intimidated her. In her testimony at hearing, Ruiz asserted that in giving the affidavit, she had not chosen the words "scared" and "intimidated" and that such words were chosen by the attorney taking the statement.

6. Franco, Jacobs, and Ortega's response concerning working overtime

Over the course of the evening shift on February 23, 2009, Jacobs, Franco, and Ortega discussed their dissatisfaction that Ruiz had been offered overtime before full-time employees were offered overtime. The three employees decided that they would not work the overtime if called, and they would not answer their telephone if contacted for overtime. As they were unloading their weapons and preparing to end their shift the following morning, Captain Steve Soto asked Ortega, Franco, and Jacobs if they wanted to work the overtime on the evening shift of February 24, because Ruiz couldn't work it. Jacobs recalled that Soto also mentioned that officers were needed for fire brigade coverage for the shift in issue. Franco confirmed that the three employees told Soto that if Respondent was not going to offer the overtime to them first, Respondent could find somebody else to do it. Franco, Ortega, and Jacobs all told Soto that they were not going to work the overtime. Both Jacobs and Franco specifically recalled that they told Soto at the end of their shift that they were not going to work that night and Respondent should not even bother to call them. Franco recalled in particular that he told Soto:

> Well, if they want to give away our overtime so they can pay somebody straight time and do it, then we are not going to work it. They don't want to pay us the overtime and offer it to us first, then, no. We are not doing it.

Franco also acknowledged that he knew that Respondent had the obligation to provide fire brigade protection on the shift in question. He further admitted that he understood that their failure to work overtime would cause a problem for Respondent. His response was that it was up to Respondent to figure out how they were going to cover the fire brigade requirement.

7. The employees' rationale for their conduct

In testifying about their reason for not working the overtime, Ortega explained that they were upset with Respondent that a part-timer with the company was getting first choice on overtime. Jacobs also testified that he had "immensely" disagreed with Respondent's having offered the overtime to a part-time employee before offering it to a full-time employee. Jacobs also told Soto that the employees felt that as a part-time employee, Ruiz should not get overtime. Jacobs also admitted in his testimony that the employees' decision to not work the overtime was a conspiracy; designed to send a message that a part-time employee receiving straight pay should not take away overtime from full-time employees. Jacobs also acknowledged that at the time that he decided that he would not work the overtime needed on February 24, 2009, he was aware that Ruiz had rescinded her decision to accept the overtime work. Jacobs testified that the fact that Ruiz had first accepted the overtime for Respondent and then declined it in order to work overtime for WTS was a "hard pill to swallow." He knew that Ruiz would have only received straight time if she had accepted the shift for Respondent and yet she was going to receive approximately $50 an hour for working overtime for WTS. When asked on cross-examination if his decision not to accept the overtime on February 24, 2009, was his way of getting even with Respondent, Jacobs answered in the affirmative. On redirect examination, however, he modified his testimony and asserted that it was more of an attempt to send a message rather than to get even with the Respondent.

8. The employees' actions after leaving work on the morning of February 24, 2009

Consistent with what the employees told Sergeant Sato on February 24, 2009, Franco, Ortega, and Jacobs did not respond to Respondent's telephone calls requesting the employees to work overtime. The augmentation log reflects that Respondent telephoned Franco at 8:26 a.m., 2:00 p.m., and 3:15 p.m. Messages were left for Franco for each call. Telephone calls were also made to Jacobs at 8:28 a.m., 2:00 p.m., 3:15 p.m., and 7:00 p.m. The log reflects that messages were left for Jacobs for three of the four calls. The log further documents that Respondent telephoned Ortega at 8:29 a.m., 2:00 p.m., 3:15 p.m., and 6:55 p.m.; with messages left for three of the four telephone calls. Neither Franco nor Jacobs returned the calls. Ortega estimated that although he received approximately four to five calls from Respondent after he finished his shift on February 24, 2009, he did not answer any of the calls. He recalled that at approximately 2:00 or 3:00 p.m., he telephoned the facility and asked to speak with Soto. When he was unable to speak with Soto, he left a message for Soto to call him. In leaving the message for Soto to call him, he did not confirm whether he would or would not come in to the facility to work the overtime. In explaining why he telephoned Soto, Ortega testified:

> Because the phone kept on ringing and it just got annoying and after the fact that I had told him that morning that don't even bother calling because I'm not going to work.

9. Franco's Discharge

When Franco left work at the end of his shift on Tuesday morning, he was not scheduled to work again until Friday. Franco asserts that after resting a few hours, he drove to Roswell, New Mexico without taking his cell phone. He testified that after returning home at approximately 8:00 p.m. that same evening, Captain Ybarra came to his house. Ybarra told Franco that De Los Santos wanted to fire him and wanted him to report to the office the following day with all of his equipment and gear. At Ybarra's suggestion, Franco telephoned De Los Santos and asked if he could meet with him. De Los Santos agreed. Ybarra accompanied Franco to the meeting with De Los Santos on February 25. Franco testified that De Los Santos told him that the corporate office wanted to terminate him because of the complaint involving Ruiz. Franco told De Los Santos that he did not harass Ruiz and that Ortega had been present during the conversation. Franco recalled that De Los Santos said that he would talk with Ortega and then he would check back with the corporate office to see if there was a change of mind. He added, however, that Franco should not get his hopes up. When Franco returned the next day, De Los Santos told him that although he had spoken with the corporate office, there had been no change in the decision to terminate him. Prior to his termination, Franco had received no previous disciplinary action.

Franco's letter of termination cites misconduct as the basis for Respondent's action. The letter includes the following:

> A complaint has been filed with the Company regarding misconduct on your part. This letter is to inform you that we have decided to terminate your employment with Security Walls. Your incessant complaining and continuous agitation and harassment of your fellow workers has created a negative and hostile working environment. Security Walls cannot and will not tolerate this type of behavior. You will return all of your issued equipment to the Canal

> Street Office. This cost of any missing equipment will be deducted from your final paycheck.

De Los Santos testified that Franco was terminated because he compromised Respondent's contract to provide security services at the WIPP facility. De Los Santos explained that under the contract, Respondent is obligated to provide fire protection and security protection for the WIPP site. De Los Santos explained that as a result of Franco's actions, he (De Los Santos) did not have enough people on duty to provide the fire protection that he was required to provide. De Los Santos testified that while the catalyst for the discharge had been Franco's telephone call to Ruiz, he made the discharge decision because Franco compromised Respondent's mission and sabotaged Respondent's ability to meet the contract.

10. Ortega's warning

In a memo dated February 27, 2009, Respondent notified Ortega that he would receive an official warning for misconduct. The memo included the following language:

> On February 24, 2009, several attempts were made to contact you, in an effort to offer an opportunity to work overtime on that evening shift. Several messages were left yet you did not return the call. As members of the security department and specifically the Protective Force we are on call to respond to emergencies on a 24 hour seven day per week basis. Fortunately this was not an emergency. However, we were not able to meet our contractual obligation of providing Fire Brigade support for that shift as a result of your failure to respond. You were aware that we would need overtime support prior to leaving the site the morning of the day in question, yet you chose to ignore the calls from the company. We are aware that we cannot require you to work incidental overtime, but we do expect the courtesy of a return call to advise us if you are able to work or not. This conduct is not acceptable and will not be tolerated. You are issued an Official Warning for misconduct which will be entered on your personnel record. You are also advised that any further misconduct of any type on your part will be cause for termination.

Approximately a week after receiving the notice of discipline, Ortega saw De Los Santos and told him that contrary to the information in the memorandum, he had returned the call to Soto to let him know that he was not going to come in to work. In response, De Los Santos told Ortega that he would remove the warning.

11. Jacobs' warning

In a memorandum dated February 27, 2009, Jacobs was informed that he was given an Official Warning because of misconduct on February 24, 2009. The memorandum contained identical language to the language contained in the disciplinary memorandum give to Ortega and dated February 27, 2009. Jacobs recalled that when he was called in to De Los Santos' office to receive the memorandum, De Los Santos told him that Respondent had not been able to provide fire brigade support for the February 24, 2009 evening shift. De Los Santos also referred to Jacobs' conduct as a "conspiracy." Jacobs testified that he did not lie to De Los Santos and admitted that it had been a conspiracy because the three officers had agreed that they were not going to work. Jacobs recalled that he told De Los Santos that he

didn't feel that it was appropriate for Ruiz to double-dip and for a part-time employee to receive straight time and deny overtime to full-time officers

12. Respondent's change in overtime procedure

De Los Santos testified that he disciplined Ortega and Jacobs because he felt that they engaged in a conspiracy with Franco to compromise Respondent's contract and to sabotage Respondent's mission. De Los Santos explained, however, that after issuing the discipline, Jacobs talked with him about the application of the augmentation list. After speaking with Jacobs, De Los Santos concluded that it was unfair to charge employees with overtime when they declined overtime from home. By memo dated February 26, 2009, the procedure for the augmentation list was modified to allow employees to decline Respondent's offer of overtime from their home without being charged for the overtime. Prior to the hearing in this matter, Respondent rescinded the warning to Jacobs. As discussed above, Respondent had already rescinded the warning to Ortega when Respondent learned that Ortega returned the call to Sergeant Sato on the evening of February 24, 2009.

C. Conclusions Concerning the Discipline Given to Franco, Ortega, and Jacobs

1. The employees' conduct in issue

On the basis of the entire record, it is apparent that the employees' conduct with respect to the overtime offer on February 24 is the triggering factor in their discipline. Franco's discipline was also prompted in part by his telephone call to Ruiz and his attempt to affect her overtime availability. The record contains testimony that approximately 5 months prior to their discipline, Franco and SPO Naaman Martinez met with Walls and De Los Santos concerning Respondent's failure to follow the predecessor's practice of paying an increase for the receipt of the Q-clearance. In January 2009, Franco and Ortega met with De Los Santos to discuss the issue of equal pay for all armed SPOs. Thus, there is no dispute that both Franco and Ortega voiced concerns to management about Respondent's pay rate for the SPOs. I do not, however, find these discussions and complaints significant to the discipline that was issued to these three employees. Although Franco, Ortega, and Jacobs may all have participated in discussions and voiced complaints about Respondent's failure to pay the additional $2 for the Q-clearance, the overall evidence does not support a finding that this conduct was the basis for the alleged unlawful discipline. Although there is no question that Franco was disciplined more severely than Ortega and Jacobs, the record does not support a finding that Respondent did so because Franco complained about working conditions to any greater extent than the other employees. Ortega, in fact, testified that he had no independent recollection of Franco's discussions with employees about the $2 raise. Ortega recalled that all of the employees were "upset" with the discontinuance of paying the raise and that all of the employees talked about this issue. Additionally, while Franco and Ortega were involved in discussions with De Los Santos and Walls about the issue of equal pay for equal work, there is nothing in the record to show that Respondent discouraged the meetings or the employees' attempts to raise such issues. Additionally, SPO Martinez participated in the September meeting with Franco, De Los Santos, and Walls without any apparent adverse consequences. Thus, while the record reflects that employees engaged in discussions among themselves and complained to management about the Respondent's failure to pay the $2 differential for the Q-clearance, the overall evidence does not support a finding that the discipline in issue was motivated by anything other than the employees' conduct on February 23 and February 24, 2009.

2. The parties' positions

Both the General Counsel and the Respondent agree that Section 7 of the Act protects employees who engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. There is no dispute that employees who protest their terms and conditions of employment are generally protected under the Act. The General Counsel submits that Respondent's discipline to Franco, Ortega, and Jacobs violates the Act because their conduct was protected by the Act. Respondent maintains, however, that the conduct of these three employees was outside the protection of the Act. Respondent further asserts that even if the employees engaged in any protected activity, the General Counsel failed to show that Respondent took any action against the employees because of any alleged protected activity.

3. Legal Analysis

(a) Existing Case Authority

In its pivotal decision in *Wright Line, Inc*., 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st. Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board provided a framework for analyzing those cases turning on a question of the employer's motivation in taking adverse action against employees. Under *Wright Line*, the General Counsel must persuade that the employee's protected activity was a substantial or motivating factor in the challenged employer decision. If General Counsel meets this prima facie requirement, the burden then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employee(s) had not engaged in protected concerted activity. *Manno Electric,* 321 NLRB 278, 280 fn. 12 (1996).

In their post-hearing briefs, both parties address the facts of this case in relation to the *Wright Line* analysis. While it does not appear that either party is arguing that the facts of this case should be analyzed solely on the basis of *Wright Line*, the parties have nevertheless addressed the application of the *Wright Line* analysis as an alternative analysis. As discussed above, the record is clear that Respondent terminated Franco and issued warnings to Ortega and Franco because of their conduct on February 23 and February 24, 2009. De Los Santos acknowledges that he imposed the discipline because of what he perceived to be a conspiracy to compromise Respondent's contract and to sabotage Respondent's mission. Counsel for the General Counsel, however, maintains that what the Respondent perceived to be a conspiracy was, in fact, protected concerted activity. Thus, while the parties dispute whether the employees' conduct was protected, there is no real issue with respect to the conduct for which the employees were disciplined. Accordingly, inasmuch as *Wright Line* is appropriately used in cases alleging violations where the respondent's motivation for taking the allegedly unlawful action is disputed, the analysis is not applicable in this instance. *Saia Motor Freight Line, Inc*., 333 NLRB 784 (2001); *Felix Industries*, 331 NLRB 144, 146 (2000), enfd. 151 F.3d 1050 (D.C. Cir. 2000).

It is well established that an employer may not discriminate against employees who protest their terms and conditions of employment. *NLRB v. Washington Aluminum Company, Inc.*, 370 U.S. 9 (1962). Such conduct by an employer violates the Act, irrespective of the motive. *Falls River Savings Bank*, 247 NLRB 631, fn. 3 (1980). In its decision in *Washington Aluminum*, the Court also pointed out that Section 7 does not protect

all concerted activities. The normal categories of unprotected conduct include activities that are unlawful, violent, or in breach of contract. In its analysis, the Court also excluded the protection of the Act for concerted activities that were characterized as "indefensible" because they were found to show a disloyalty to the workers' employer. *Ibid* at 17.

In arguing that these employees engaged in unprotected conduct, Respondent cites the Court's earlier decision in *NLRB v. Electrical Workers Local 1229*, 346 U.S. 464, 472 (1953), in which the Court noted that Section 7 does not immunize an employee from discharge for acts of disloyalty or misconduct merely because those acts were associated with protected activity. Respondent argues that these employees engaged in a "concerted refusal to work fully knowing that their conduct would compromise the ability of Respondent to provide the required security service to the WIPP site." Respondent asserts that in doing so, these employees failed to take reasonable precautions to protect both Respondent and the WIPP site from "foreseeable imminent danger" and thus their conduct was "indefensible" and not entitled to the protection of Section 7 of the Act.

In the alternative, Respondent also argues that even if the employees engaged in protected activity, the General Counsel has not met its burden under the analytical framework of *Wright Line*. Citing the Board's decisions in *Jordan Marsch Stores Corp*., 317 NLRB 460 (1995) and *GHR Energy Corp*., 294 NLRB 1011, 1012-13 (1989), affirmed 924 F.2d 1055 (5th Cir. 1991), Respondent asserts that an employer "must only show that it reasonably believed" that the employee engaged in conduct warranting the adverse employment action to establish its affirmative defense. In both cases cited by Respondent, the Board affirmed the judge in finding that while the General Counsel had established a prima facie case of discriminatory discipline, the employer had "reasonably believed" that the employees in issue had engaged in serious misconduct. In *GHR Energy Corp*., the employer reasonably believed that the suspended employees had engaged in serious conduct endangering other employees and the plant itself. In *Jordan Marsch Stores Corp,* the employer reasonably believed that the employee in issue committed a fraud that would have been grounds for discipline under the employer's policies.

Although Respondent asserts that it is relieved of liability because it "reasonably believed" that the discriminatees were engaging in misconduct that warranted discipline, General Counsel argues that the Supreme Court's decision in *NLRB v. Burnup & Sims*[6] provides the appropriate analytical analysis. In *Burnup & Sims*, the Supreme Court affirmed the Board's rule that an employer violates Section 8(a)(1) of the Act by discharging or disciplining an employee based on its good-faith, but mistaken belief, that the employee engaged in misconduct in the course of protected activity. As the Board reiterated in *White Electrical Construction, Inc*, 345 NLRB 1095 (2005), *Burnup & Sims* applies when an employer disciplines an employee for allegedly engaging in misconduct in the course of protected activity. In that instance, a good faith belief that the employees engaged in misconduct is not a defense if the General Counsel proves that the employees did not, in fact, engage in the misconduct. In *White Electrical*, the Board went on to point out however, that the *Burnup & Sims* rationale does not apply when employees are not engaged in protected activity. Thus, an employer does not violate the Act by disciplining an employee based on a mistaken belief that they engaged in misconduct if their actions did not arise out of any protected activity. In other words, under the *Burnup & Sims* analysis, once the

[6] 379 U.S. 21 (1964).

respondent has established that it had a good faith belief that the employee engaged in misconduct, the burden shifts back to the General Counsel to prove by a preponderance of the evidence that that the employee did not, in fact, engage in the misconduct. See *Marshall Engineered Products Company*, 351 NLRB 767, 768 (2007) *Pepsi-Cola Company*, 330 NLRB 474, 475 (2000).

(b) Application of the legal analysis

Although there is no real dispute as to the basis for Franco's discharge and the warnings issued to Jacobs and Ortega, the critical question is whether Franco, Jacobs, and Ortega engaged in protected concerted activity when they conspired to become unavailable for needed overtime and when Franco telephoned Ruiz to discourage her from working overtime.

In deciding *Yuker Construction Co*., 335 NLRB 1072, 1073 (2001), the Board dealt with a situation in which the employer terminated two over-the-road drivers for statements made during a Nextel phone conversation while they were on the job. In the course of the conversation, the drivers talked about the employer's upcoming work available to them, their opinion of the rate of pay that the employer would offer, whether they would work at that rate, and the existence of other jobs available. The employer overheard their conversation on the Nextel phone and mistakenly concluded that they were actively seeking other employment while on the employer's payroll. The Board affirmed the judge in finding that the employees' discussion of their plans in searching for alternative work during the winter months does not constitute concerted activity within the meaning of the Act. Citing the Board's decision in *Meyers Industries* (*Meyers II*), 281 NLRB 882, 887 (1986), the judge specifically noted that there was no evidence that their talk was "engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interests of the employees." There is no real dispute that Franco, Ortega, and Jacobs purposely withdrew their availability for overtime because they did not like the fact that Respondent offered overtime to a part-time employee rather than making it available for full-time employees. Although the availability of overtime work would certainly be of an interest to all employees, there was no evidence that they did so for the purpose of "initiating or preparing for group action" as envisioned by *Meyers II* or as discussed in *Yuker Construction*. Based upon their own testimony and the undisputed facts, it appears that they took the action they did to teach Respondent a lesson for making the overtime available to Ruiz before offering it to them or simply to retaliate against Respondent for having done so. Additionally, I also note that Franco's telephone call to Ruiz could not be characterized as initiating or preparing for group action. Although Franco and Ortega attempted to characterize the telephone call as a friendly request to Ruiz, the purpose was clearly to intimidate her and to discourage her from accepting part-time work with Respondent.

Respondent argues that Franco specifically testified that he never raised any concerns relating to the overtime policy or the augmentation list with De Los Santos prior to February 24, 2009. While I note that an employee's failure to make any specific demand or to notify the employer of the reasons for a concerted action does not render the conduct unprotected,[7] Franco's failure to do so is a factor in concluding that these employees' conduct was more akin to retaliation rather than true protected concerted activity.

[7] *Eaton Warehousing Company*, 297 NLRB 958, fn. 3 (1990).

In his brief, counsel for Respondent cites a number of cases in which the various courts have found partial strikes and intermittent work stoppages to be unprotected. Overall, I don't find the circumstances of this case to be analogous to a partial strike or intermittent work stoppage. Respondent does not allege that these three employees failed to report for scheduled work or allege that these employees left work during a scheduled shift. Clearly, the conduct in issue is their deliberate decision to ignore Respondent's need for overtime coverage on February 24, with the knowledge of the potential consequences affecting Respondent and the government facility.

Respondent also cites the Board's decision in *International Protective Services, Inc.,*[8] for the proposition that concerted activity is indefensible where employees fail to take "reasonable precautions" to protect the employer's operations from foreseeable imminent danger. The circumstances of *International Protective Services* involved the employees of a security service that had contracted with the Government Services Administration to provide security in Alaska's federal buildings. The Board concluded that these employees' strike at a time of heightened security concerns was not protected by the Act because the strike exposed the Federal buildings and their occupants to foreseeable danger.

In a very recent decision, the Board found that employees' lost the protection of the Act in somewhat similar circumstances. In *AKAL Security, Inc.,* 354 NLRB No. 11, slip op. at 1 (April 30, 2009), the respondent employer contracted with the United States Marshals Service (USMS) to provide security services at federal courthouses. Without supervisory permission, two court security officers held a 30-minute meeting with other employees during working time to confront another court security officer about his performance problems which they believed to potentially jeopardize the safety of court security officers. The employer concluded that the two officers not only harassed the employee who had been confronted, but the officers also neglected their duties during the meeting. While the respondent employer recommended that the employees be suspended, the USMS wanted the officers removed from working under its contract. In applying *Burnup & Sims*, the judge found the purpose of the meeting was protected and found a violation of 8(a)(1) of the Act. The Board, however, found merit to the employer's argument that the employees' conduct lost the protection of the Act. The Board noted that the respondent employer determined that the employees created a security risk by convening the meeting during operational hours at a location in the courthouse where they could not fully and effectively monitor the courthouse. The Board found that the employer had a good-faith belief that the employees engaged in such conduct and the General Counsel failed to prove that the misconduct did not occur.

Respondent presented both De Los Santos and WTU's contract administrator; Mark Friend, to testify about Respondent's requirement to have trained SPOs on fire brigade duty on the evening of February 24, 2009. Friend testified without contradiction that if Respondent had been unable to provide fire brigade services for that evening shift, WTU would have had to depend upon back up services from county services that were located 32 to 40 miles away from the facility. Franco admitted that he was aware that Respondent had the obligation to provide fire brigade protection on the shift in question and he knew that the unavailability of SPOs for overtime was going to cause a problem for Respondent. Respondent argues that the discriminatees decided to engage in a concerted refusal to work

[8] 339 NLRB 701, 702 (2003).

knowing that their conduct would compromise the ability of Respondent to provide the required security services to the WIPP site. Respondent argues that in doing so, the discriminatees failed to take reasonable precautions to protect both Respondent and the WIPP site from "foreseeable imminent danger." Respondent's argument has merit.

Jacobs confirmed that not only did Soto tell them that Respondent needed overtime coverage, but Soto specifically told them that fire brigade coverage was needed. When Jacobs was given his discipline, he admitted to De Los Santos that their conduct on February 24, 2009 had been a conspiracy. He fully acknowledged that the three employees conspired and agreed that they were not going to work.

It is undisputed that these three employees did not want Respondent to offer overtime to Ruiz or any other part-time employee. They believed that the overtime should have been offered to them before offering it to part-time employees. After Franco and Ortega's call to Ruiz, Franco, Ortega, and Jacobs then agreed upon a plan to become unavailable for the coverage needed for February 24, 2009. Admittedly, they knew that in doing so, Respondent would be placed in a difficult position with WTS. Sergeant Ybarra credibly testified that it was not just a matter of these employees not returning calls, but the fact that they knew that they were the only SPOs who were available for the shift. Ybarra further testified that in his 22 years of experience in working for both Santa Fe and for Respondent, he had never known of a situation in which SPOs told a Captain to not bother calling them because they were not coming in to work. Contract Administrator Mark Friend also testified that the overtime incident in February 2009 was the first time that he had been aware that Respondent had not been able to provide the requisite fire brigade services under the contract, forcing WTS to secure the services elsewhere.

Based upon the above, I do not find that Respondent disciplined these employees for conduct that was protected by the Act. Accordingly, by attempting to affect how overtime would be offered to employees, the actions of these employees were nothing more than their attempt to unilaterally determine their terms and conditions of employment, conduct that is not protected by the Act. *Chep USA and Anthony McGlothian*, 345 NLRB 808, 817 (2005); *House of Raeford Farms, Inc.,* 325 NLRB 463 (1998); *Bird Engineering*, 270 NLRB 1415 (1984).

Therefore, I do not find that Respondent violated Section 8(a)(1) of the Act by terminating Franco and by issuing disciplinary notices to Ortega and Jacobs.

D. Respondent's Confidentiality Rules

At the outset of the hearing in this matter, Counsel for the General Counsel moved to amend the complaint to allege that since October 24, 2008, Respondent has maintained an overly-broad confidentiality rule in violation of the Act. As a basis for this allegation, General Counsel relies upon specific wording in Respondent's Employee Handbook and in its Restrictive Covenants Policy.

Page 8 of the Respondent's Employee Handbook provides:

> **<u>Confidentiality</u>**
> In cases involving a report of harassment or discrimination, all reasonable efforts will be made to protect the privacy of the individuals involved. In many

> cases, however, Security Walls' duty to investigate and remedy harassment makes absolute confidentiality impossible. Security Walls will try to limit the sharing of confidential information with employees on a "need to know" basis. Employees who assist in an investigation are required to maintain the confidentiality of all information learned or provided. Violation of confidentiality will result in disciplinary action.

Page 11 of the Respondent's Employee Handbook provides:

> **Confidentiality**
> All records and files of the Company are property of the Company and considered confidential. No employee is authorized to copy or disclose any file or record. Confidential information includes all letters or any other information concerning transactions with customer, customer lists, payroll or personnel records of past or present employees, financial records of the Company, all records pertaining to purchases from vendors or suppliers, correspondence and agreements with manufacturers or distributors and documents concerning operating procedures of the Company. All telephone calls, letters, or other requests for information about current or former employee should be immediately directed to the proper members of Security Walls' management.

In the Motion, General Counsel also points to page 2 of the Restrictive Covenant that contains a directive of what an employee or terminated employee is prohibited to use or disclose. The two areas of prohibited disclosure upon which the General Counsel relies are identified as:

> (1) Insurance and benefits cost formulas and payment premiums
> (2) Personal and/or sensitive information regarding any Security Walls, LLC employee with particular emphasis on salary/hourly wage rate, benefits, promotions demotions, disciplinary actions, bonuses, or other actions which are clearly the authority of the Human Resource Department.

1. General Counsel's argument

Counsel for the General Counsel argues that the Board and courts have long recognized the importance of communication among employees regarding their wages, hours, and other terms and conditions of employment.[9] General Counsel specifically points to the Board's decision in *The NLS Group*, 352 NLRB 744, 745 (2008), where the Board reiterated its standard for determining whether a work rule violates Section 7 of the Act. Following its earlier decision in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), the Board in *The NLS Group* reiterated that even if a rule does not explicitly restrict Section 7 rights, the rule is nonetheless unlawful if employees would reasonably construe the language of the rule to prohibit Section 7 activity.

[9] *Central Hardware Co. v. NLRB*, 407 U.S. 539, 542-43 (1972).

2. Conclusions concerning Respondent's confidentiality rules

The Board has cautioned, however, that a rule should be given a "reasonable reading" and that particular phrases in a rule should not be read in isolation or presumed to have improper interference with Section 7 rights. *Guardsmark, LLC*, 344 NLRB 809 (2005); *LaFayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999). In *LaFayette Park,* the confidentiality rule in issue prohibited employees from divulging hotel-private information to employees or other individuals or entities that were not authorized to receive that information. The Board opined that employees would not reasonably read this rule as prohibiting a discussion of wages and working conditions. The Board concluded that employees would reasonably understand that this rule was created to protect the employer's legitimate interest in the confidentiality of its private information; such as guest information, trade secrets, and contracts with suppliers. Thus, the Board concluded that the rule did not interfere with employee Section 7 rights, even though it reasonably addressed and protected the employer's interest in confidentiality. In a later case[10] in which the Board applied the same rationale as *LaFayette Park*, the confidentiality rule in issue simply stated "company business and documents are confidential. Disclosure of such information is prohibited." Applying the rationale of *LaFayette Park*, the Board concluded that employees would reasonably understand from the language of the confidentiality provision that it was designed to protect the employer's legitimate interest in maintaining the confidentiality of its private business information, not to prohibit discussion of wages or working conditions.

Thus, the central question appears to be whether employees would read a confidentiality rule as prohibiting protected employee communications about terms and conditions of employment or whether employees would recognize "the legitimate business reasons" for which such a rule is promulgated and would not believe that it reaches Section 7 activity. *LaFayette Park* at 827. Clearly, the way in which employees may reasonably construe the language is pivotal.

In a 2004[11] case, the employees of a casino were cautioned that they may be required to deal with information of an extremely confidential nature and that it was essential that such information not leave the respective employer's department by document or verbally other than as required by a job function. Specifically included in the prohibited information was information concerning salary grades, pay increases, as well as disciplinary information. The confidentiality rule went on to caution that information should be provided to "employees outside the department" or to those outside the company only when a valid "need to know" was shown to exist. The rule also cautioned that personal information concerning individual employees should not be discussed with members of an employee's own group. In finding that the confidentiality rule infringed upon employees' Section 7 rights, the Board noted that the employer's confidentiality rule left nothing for the employees to construe because it specifically defined confidential information as including information concerning salary, disciplinary information, etc.; falling clearly within the realm of wages and working conditions.

Respondent's Restrictive Covenants Policy provides that it is in the business of "providing technical counter-surveillance measures, security police officers, and other

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[10] *K-Mart,* 330 NLRB 263 (1999).

[11] *Double Eagle Hotel & Casino*, 341 NLRB, 112, 115 (2004).

security-related services to governmental, public, and private persons and entities." Respondent maintains that because of the nature of its business, it is charged with maintaining the confidentiality of information about its clients' trade secrets. The policy continues by asserting that employees may become aware of, or obtain information, that relates to its trade secrets or those of Respondent's client. Although the policy devotes a good deal of attention to the restrictions that apply after an employee leaves his or her employment with Respondent, the policy also references the restrictions imposed in disclosing confidential information during the employee's employment. As referenced above, confidential information is specifically defined to include "personal and/or sensitive information regarding any employee with particular emphasis on salary/hourly wage rate, benefits, promotions, demotions, disciplinary actions, bonuses, or other actions which are clearly the authority of the Human Resources Department." There is nothing in the policy that gives employees any assurances that the broad restrictions identified in the policy carve out or exclude discussions that would otherwise be protected by Section 7 of the Act. More specifically, there is nothing in the policy that clearly explains that the restrictions apply only to "legitimate business concerns" and not to their discussion of wages and other terms of employment that is protected by the Act. Where there is an unqualified prohibition, the rule may reasonably be construed by employees to restrict discussion of wages and other terms and conditions of employment with their fellow employees. *Cintas Corporation*, 344 NLRB 943 (2005). In its 2006 decision in *Biggs Food*, 347 NLRB 425, 426 (2006), the Board adopted the judge's analysis and relied upon *Cintas Corporation* in finding a confidentiality rule as unlawfully overbroad. The Board concluded that employees could reasonably understand the rule, which prohibited disclosure of, among other things, salaries to "anyone outside the company" as prohibiting discussion of salaries with union representatives. Member Kirsanow noted that while he appreciated that the respondent and employers generally have a legitimate interest in safeguarding their confidential information from disclosure to competitors, nothing in the Board's order precluded the respondent from modifying its confidentiality policy "so that its interests are protected and the employees' Section 7 rights are not violated."[12] Member Kirsanow's suggestion is equally applicable to Respondent's Restrictive Covenant Policy.

The policy provides for the recovery of damages from an employee in the event of a breach of the covenant. Although there is no evidence that the Respondent has used the policy as a basis for discipline or legal recourse against an employee, there remains, however, a written prohibition and a clear warning of what will occur if an employee or former employee breaches the covenant. Although I have no basis to conclude that Respondent prepared this document other than to safeguard the confidential information of its client and to protect itself from competitors, the language does not contain a qualified prohibition and employees could easily construe the policy to prohibit their discussion of wages and other terms and conditions of employment as protected by the Act. Accordingly, I find the language in issue in the Restrictive Covenants Policy to be violative of the Act as alleged by the General Counsel.

General Counsel also references the wording of the confidentiality rule set forth at page 8 of Respondent's Employee Handbook. The wording asserts employees who assist in an investigation of harassment or discrimination claims are required to maintain the

[12] Citing language from *Double Eagle Hotel & Casino v. NLRB,* 414 F.3d 1249, 1260 (10th Cir. 2005).

confidentiality of all information learned or provided. The rule provides that a violation of confidentiality will result in disciplinary action. Counsel for the General Counsel submits that an objective reading of such a rule requires the conclusion that employees are prohibited from discussing with each other acts of discrimination and other types of harassment in the workplace once Respondent has begun an investigation. De Los Santos testified that Respondent maintained this rule because of a need to protect both the victim and the accused in a sexual harassment complaint. He asserted that the rule did not preclude the victim or the alleged perpetrator from discussing the matter. The rule, however, specifically states that employees who assist in an investigation are required to maintain the confidentiality of all information learned or provided and a violation of confidentiality will result in disciplinary action. There is no caveat, however, giving employees any assurances that this rule does not preclude their own discussion among themselves of sexual harassment concerns or issues. The Board has found that a confidentiality rule prohibiting employees from discussing their sexual harassment complaints among themselves is violative of Section 8(a)(1) of the Act. *Phoenix Transit System*, 337 NLRB 510 (2002).

There are instances in which the Board has used a balancing test in addressing an employer's asserted justification for a broad confidentiality policy. In *Caesar's Palace*, 336 NLRB 271 (2001), the employer imposed a confidentiality rule during an investigation of alleged illegal drug activity in the work place. Because the investigation involved allegations of a management cover-up and possible management retaliation, as well as threats of violence, the employer's investigating officials attempted to impose a confidentiality rule to ensure that witnesses were not in risk of danger, that evidence was not destroyed, and that testimony was not fabricated. In that instance, the Board found that the employer established a substantial and legitimate business justification for its rule and under the circumstances of the case; the justification outweighed the rule's infringement on employee rights. *Id* at 272. Such is not the circumstance in this matter. In this instance, employees could easily construe the wording of Respondent's confidentiality rule as prohibiting discussions as guaranteed by their rights under Section 7 of the Act. There is no evidence of any extenuating circumstances that provide a substantial and legitimate business justification for the existing rule. Accordingly, I find the confidentiality language found on page 8 of the Employee Handbook to violate Section 8(a)(1) of the Act.

Counsel for the General Counsel also maintains that employees would reasonably construe the rules maintained at page 11 of the Employee Handbook as restricting their right to talk with each other about various terms and conditions of employment. I disagree. The section entitled Confidentiality on page 11 of the Employee Handbook deals with Respondent's records and files. The rule precludes an employees' copying or disclosing certain files or records relating to transactions with customers, customer lists, payroll or personnel records of past or present employees, financial records of the company, all records pertaining to purchases from vendors or suppliers, correspondence and agreements with manufacturers or distributors and documents concerning operating procedures of the Company. While I note that payroll or personnel records are included in this list of documents prohibited from disclosure, an objective reading of this rule would indicate that the rule is directed toward the confidentiality of Respondent's business records and not to the prohibition of employees' Section 7 rights. It is not apparent that employees would construe this rule to preclude their ability to discuss among themselves matters relating to wages and terms and conditions of employment. According, I do not find the language on page 11 of the Employee Handbook violative of the Act.

Conclusions of Law

1. Security Walls, LLC, Respondent, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By maintaining overly broad confidentiality rules prohibiting employees from discussing wage rates, benefits, promotions, demotions, disciplinary actions, bonuses, or other terms and conditions of employment, Respondent violated Section 8(a)(1) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:[13]

ORDER

The Respondent, Security Walls, LLC, Carlsbad, New Mexico, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Maintaining an overly broad confidentiality rule prohibiting employees from discussing wage rates, benefits, promotions, demotions, disciplinary actions, bonuses, or other terms and conditions of employment.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Within 14 days after service by the Region, post at its Carlsbad, New Mexico, facility copies of the attached notice marked "Appendix."[14] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all

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[13] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[14] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 24, 2008.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., November 25, 2009.

Margaret G. Brakebusch
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT maintain overly-broad confidentiality rules prohibiting you from discussing your salary, wage rates, benefits, promotions, demotions, disciplinary actions, bonuses, or other terms and conditions of employment.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL notify you in writing that the overly-broad confidentiality rules contained in our Employee Handbook and our Restrictive Covenants Policy, prohibiting you from discussing your salary, wage rates, benefits, promotions, demotions, disciplinary actions, bonuses, and other terms and conditions of employment are rescinded and void and will not be enforced and that we will not prohibit you from discussing your salary, wage rates, benefits, promotions, demotions, disciplinary actions, bonuses, or other terms and conditions of employment with other employees in a manner protected by the Act.

SECURITY WALLS, LLC

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to an agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov

2600 North Central Avenue, Suite 1800
Phoenix, AZ 85004-3099
(602) 640-2160 (and from within AZ: 800-552-8809)
8:15 a.m. to 4:45 p.m.

THIS IS AN OFFICIAL NOTE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIALS. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER. (602) 640-2146.